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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

FAMILY COURT APPEAL NO.133 OF 2007

IN

CIVIL APPLICATION NO.193 OF 2007

IN

CIVIL APPLICATION NO.304 OF 2008

WITH

FAMILY COURT APPEAL NO.25 OF 2007

WITH

FAMILY COURT APPEAL NO.40 OF 2007

Mrs. Nilambari Narendra Bhosale

... Appellant

Vs.

Shri Narendra Baburao Bhosale

... Respondent

Mr. M.S. Karnik i/by Mr. Sanjay Shivajirao Patil, for the Appellant/
Applicant in all Appeals.

Mr. Rajesh N. Kachare, for the Respondent in all Appeals.

CORAM : A.S. OKA & A.S. GADKARI, JJ.

JUDGMENT RESERVED ON : 12th DECEMBER, 2014

JUDGMENT PRONOUNCED ON : 1st APRIL, 2015

JUDGMENT (PER A.S. OKA, J.):

This is a case where this Division Bench and even the earlier Bench repeatedly tried to bring about amicable settlement between the parties. Even both the learned counsel tried their best. But, unfortunately, there was no success. We were of the view that Judicial verdict is not going to be a real solution to the dispute. Though the

Judgment could have been pronounced earlier, we delayed the pronouncement with the hope that the parties will see the reason. But, what we were hoping for has not happened. Hence, with some reluctance that we are coming out with our verdict.

2. These are the Appeals preferred by the wife. The marriage between the Appellant and the Respondent was solemnised in accordance with Hindu Vedic Rites on 7th May, 1993. On 29th March, 1994, a female child by the name Tanvi (earlier known as Niyati) was born. The husband filed a Petition bearing A-860 of 1996 for a decree of divorce on the ground of cruelty under Clause (i-a) of Sub-Section (1) of Section 13 of the Hindu Marriage Act, 1950 (for short “the said Act”). The wife filed a Petition being Petition No.A-295 of 1999 for a decree of restitution of conjugal rights under Section 9 of the said Act. The Appellant wife also filed a Petition being Petition No.C-119 of 2005 under Sections 18 and 20 of the Hindu Adoption and Maintenance Act, 1956 (for short “the said Act of 1956”) against the husband for claiming maintenance. The Appellant wife claimed maintenance of Rs.5,000/- pm each for herself and her daughter with effect from 25th May, 1995. She prayed for a decree directing the husband to pay a monthly rent of Rs.5,000/- pm with effect from 25th May, 1995 towards her residence .

3. All the three Petitions were contested. The said Petitions were heard together by the learned Judge of the Family Court at Mumbai and were decided by a common judgment dated 16th January, 2007. The operative part of the impugned judgment and decree reads thus :-

“ORDER

The petition bearing No.A-860 of 1996 is allowed.

The marriage of the petitioner with the respondent which was solemnized on 7-5-1993 stands dissolved from the date of decree of divorce.

The Petition for custody stands disallowed and/or rejected. However the petitioner is entitled to avail access on the date desired by him on prior intimation to the respondent and the daughter.

The Petitioner shall pay permanent alimony at the rate of Rs.6000/- per month to the wife-respondent till her legal dis-entitlement, from the date of decree.

The Petitioner- husband shall pay the maintenance at the rate of Rs.3500/- per month to the daughter from the date of decree, till her marriage.

The Petition No.A-295 of 1999 stands dismissed.

The Petition No.C-119 of 2005 is allowed.

The Petitioner is entitled for the maintenance as ordered herein above and that alimony shall include the maintenance under this petition.”

In view of the circumstances and the long standing battle, parties are left to bear their own costs.”

4. The learned Judge held that the ground of cruelty has been established by the Respondent husband. The learned Judge held that the Appellant - wife is dis-entitled to a decree for restitution of conjugal rights. Though the learned Judge granted maintenance as aforesaid, he did not grant any amount towards the rent payable to the wife.

5. Family Court Appeal No.133 of 2007 has been preferred by the wife being aggrieved by the decree passed in Petition No.C-119 of 2005 under Sections 18 and 20 of the said Act of 1956. The contention in the said Appeal is that the maintenance ought to have been granted at least from the date of the filing of the Petition. Another grievance in the Appeal is as regards the refusal of the learned Judge to grant maintenance as prayed for and refusal to grant rent at the rate of Rs.5,000/- pm. Family Court Appeal No.40 of 2007 has been preferred by the wife for challenging the decree of divorce passed in Petition No.A-860 of 1996. Family Court Appeal No.25 of 2007 has been preferred by the Appellant - wife for challenging the decree passed by which the Petition for restitution of conjugal rights filed by her was dismissed.

6. The Petition for divorce was filed by the Respondent husband on 15th May, 1996. The Petition for restitution of conjugal

rights was filed by the Appellant - wife on 24th February, 1999 and the Petition for maintenance was filed on 13th September, 2005.

7. It will be necessary to make a reference to the case made out in the Petition for divorce filed by the Respondent husband. The Respondent husband was in the employment of Air India. The marriage between the parties was an arranged marriage. The case made out in the Petition for divorce is that immediately after the marriage, the Appellant - wife objected to performance of certain religious ceremonies as per the customs and rituals of the community. It is alleged that the Appellant - wife declined to change her name after the marriage. The allegation is that the Appellant used to frequently visit her parents' house. Further, the allegation is that the Appellant used to disrespect the Respondent in presence of friends and relatives and behaviour of the Appellant - wife used to be uncivilized.

8. It is alleged that immediately after the marriage, when both of them went to Goa, they were invited by the Respondent's friend for a meal but the Appellant - wife refused to accompany the Respondent husband to his friend.

9. It is alleged that the Appellant is of a quarrelsome nature and in fact she started doubting the character of the Respondent

husband. It is alleged that such allegations caused pain to the Respondent husband. It is alleged that the Appellant never assisted other family members to do the household work.

10. The case of the Respondent husband is that the Appellant never disclosed the salary received by her and she never contributed to the household expenditure. The case of the Respondent is that the Appellant suggested to the Respondent that she wanted to complete modelling sessions with one of her cousins who was a professional photographer. When the Respondent objected to do it, the Appellant got irritated and started treating each of the family members of the Respondent family with hatred. It is alleged that she always humiliated and disobeyed the elder members of the family. It is alleged that such behaviour caused mental torture to the Respondent husband.

11. A specific case is made out that the Appellant made false and baseless allegations against the Respondent husband as regards his character. The case of the Respondent is that the behaviour of the Appellant was always troublesome. She went to the extent of making allegations against the doctor attending to her by alleging that he has misbehaved with her. It is alleged that after delivery of the child, the Appellant persisted with such conduct and in fact made the servant

appointed by the Respondent to take her care to gave up the employment.

12. It is stated that after the birth of the child, the Appellant was staying in her parents' house. On 24th May, 1994, her brother called up the Respondent and informed the Respondent to take the Appellant and her child back to the matrimonial home. It is alleged that after the Appellant was brought to the matrimonial home, she never took proper care of the daughter.

13. The case made out by the Respondent is that even thereafter the peculiar conduct of the Appellant continued. In fact, she alleged that the Respondent was a womanizer. The Appellant threatened that she would teach a lesson to the Respondent by attempting to commit suicide by consuming poison. The case of the Respondent is that the Appellant threatened him that she will ensure that the entire family of the Respondent is implicated in criminal cases. It is alleged that the Appellant gave a threat to the Respondent that she will ruin his family by taking help of anti-social elements.

14. The case made out by the Respondent is that on 12th September, 1994, the Appellant picked up quarrels with the family

members over trivial issues. It is alleged that she created a scene in presence of the family members and after humiliating the Respondent and his family members, she left the matrimonial home along with the minor girl. It is alleged that though the Respondent requested the Appellant to return home, the Appellant threatened to commit suicide. After lot of efforts by the Respondent and the others, the Appellant returned back the matrimonial home. However, after return, she insisted upon leaving. Accordingly, she again left the matrimonial home.

15. The Respondent - husband has alleged that on the same night on which the Appellant went back to her parents' house, at 11.00 pm, maternal uncle of the Appellant by the name Prakash called the Respondent husband on telephone and asked him to hand over her belongings. Accordingly, two bags and belongings of the Appellant - wife were collected by the said Prakash. At that time, the said Prakash suggested that the Respondent husband should send his parents to native place and asked Respondent's brother to secure another accommodation. His suggestion was that only the Appellant and the Respondent should stay in the matrimonial home. The Respondent - husband expressed inability to do so and requested the Appellant's maternal uncle not to interfere.

16. The case made out by the Respondent husband is that two or three days thereafter, the Appellant along with her mother went to one Mr. Pandit who is his friend. They reached house of Mr. Pandit at 11.00 pm and started making allegations against the Respondent and his family members. The allegation is that the Appellant insisted on Mr. Pandit calling the Respondent to his house at midnight. Mr. Pandit requested the Respondent to visit his house on the next day. Accordingly, on the next day, the Respondent visited the house of Mr. Pandit when the Appellant was also present. After hearing both of them when Mr. Pandit suggested to the Appellant to behave herself, she became violent. She started abusing, insulting and threatening the Respondent and his parents. In fact, she went to the extent of insulting Mr. Pandit. Therefore, Mr. Pandit was forced to make both of them to leave his house. The Respondent stated that in the said meeting apart from Mr. Pandit, his another friend Mr. Mahesh K. Oak was also present.

17. The case of the Respondent is that on the next date, the Appellant's father contacted him and made all sorts of allegations and even threatened to lodge a complaint with the police against him and his family members under Section 498A of the Indian Penal Code. The Appellant's parents threatened the Respondent to approach a women's organization and to bring a "Morchha" to his house. The Respondent

requested the Appellant and other relatives of the Appellant to arrange a meeting in presence of elderly persons to sort out the issue.

18. On 16th October, 1994, a meeting was convened at Mulund, Mumbai which was attended by the Respondent, his parents, one Kashinath Bhosale, the Appellant, her parents and her maternal uncle Mr.Prakash. Her grandfather and another uncle Subhash Bhosale were also present. In the said meeting, allegations were made against the Respondent by the Appellant and her relatives. It is alleged that the Appellant become violent in the said meeting. The case of the Respondent is that his uncle took lead and stated that he would see that a separate accommodation is arranged for both the Appellant and Respondent to stay together. At that time, the Appellant's father insisted on returning the ornaments of the Appellant. Accordingly, belongings of the Appellant were handed over by the Respondent by visiting the place of the parents of the Appellant. During the said visit, it is alleged that the Appellant's brother became violent and started threatening the Respondent. It is alleged that during the said visit, the Appellant became so violent that she went to the extent of making an attempt to assault the Respondent after detaining him in a room.

19. In February, 1995, the Appellant's maternal uncles came to the Respondent - husband and requested him to bring back the Appellant to the matrimonial home. They assured that the Appellant would behave properly. On 2nd March, 1993, the maternal uncles of the Appellant brought her to the matrimonial home and asked the Appellant to tender an apology to the Respondent and the Respondent's parents, but the Appellant declined to do so. The Appellant's maternal uncles assured the Respondent that if any problem was created by the Appellant, they will themselves take the Appellant to her parents' house. It is alleged that even thereafter, the Appellant was not behaving properly.

20. On 24th May, 1995, it is alleged that the Appellant fought with the Respondent early morning and threatened to commit such acts by which the Respondent and his family members would come in trouble. At about 10.45 am, when the Respondent was at his workplace, he received a call that the Appellant had become violent. The Respondent rushed to his house when he found the Appellant standing outside the house. Though he made a request, the Appellant refused to enter the house and stated that she would make the whole world know about their fights. Therefore, the Respondent called the Appellant's uncle who came there and took the Appellant to her parents' house.

21. On 25th May, 1995, the Appellant's parents and her brother came to the matrimonial home at about 9.15 pm and entered the house though Respondent was not there. They started threatening the Respondent's parents. The Respondent immediately rushed home. It is stated that the Appellant's brother assaulted the Respondent. It is stated that after the said incident, there were number of meetings for reconciliation. It is stated that on 19th November, 1995 the Appellant's parents and relatives came to Respondent's house and started threatening him. On 4th December, 1996, the Respondent along with his neighbour Mr. Dahivalkar, who is an Advocate visited the Appellant's house. Shri Dahivalkar made an attempt to bring about reconciliation. However, there was no response on the part of the Appellant. According to the case of the Respondent, the Appellant refused to come back to the matrimonial home unless the Respondent's parents were thrown out or a separate suitable accommodation was arranged around Mulund in Mumbai. By a letter dated 25th December, 1995 addressed by the Respondent to the Appellant he appealed to the Appellant to resume the matrimonial life in the interests of the daughter. It is alleged that no reply was sent to the said letter and on the contrary, the Appellant threatened the Respondent of dire consequences. In fact, she suggested that she would take help of anti-social elements. Therefore, the Respondent lodged a police complaint in writing on 12th February, 1996.

On 24th February, 1996, the Appellant's father by using foul words threatened that he would take help of anti-social elements.

22. The allegation of the Respondent is that on 3rd March, 1996, he received a threat from a notorious gangster. Therefore, on the same day, Respondent lodged a complaint with the police which was registered as NC complaint. After receiving further threats on 10th March, 1996 the Respondent again lodged a police complaint. The case of the Respondent is that thereafter he started receiving telephonic calls from unknown persons at his office as well as residence. According to the case of the Respondent on 24, 25 and 26th April, 1996, some women members of the Vanita Mandal Ganesh Society came to his place and tried to pressurise him on the basis of false information supplied by the Appellant. As there was a threat to the life of the Respondent and his family members, the Respondent again lodged police complaint on 26th April, 1996.

23. The case made out by the Respondent in his Petition is that since 24th May, 1995, the Appellant has deserted him without any reasonable cause. It is alleged that considering the threats received by the Respondent from the Appellant, there was a reasonable apprehension in his mind that it would be harmful for him to live in the

company of the Appellant. Therefore, the Respondent sought a decree of divorce on the ground of cruelty.

24. The Appellant filed a detailed written statement denying the allegations made against her and explaining some of the allegations. It is alleged that the Respondent's mother forced her to pay a sum of Rs.1,500/- pm for the household expenses. She denied the allegations that she was interested in continuing modelling. Her contention is that she removed the maid servant appointed by the Respondent as she intended to look after daughter herself. Her allegation is that after the birth of the daughter, neither the Respondent nor his family members visited her and inquired about her health. The Appellant explained as to why she was required to visit her parents' home on 12th September, 1994. The Appellant stated that she visited Mr. Pandit's house in the night as usually the Respondent used to visit his house everyday after dinner. She denied the allegations made against her as regards her conduct in the meeting in presence of Shri Pandit. According to the case of the Appellant, the Respondent had assured her that they will live separately.

25. The Appellant denied various allegations made by the Respondent. Her contention is that her friends who are the members of

the Vanita Mandal Ganesh Society had gone to the house of the Respondent only with a view to request the Respondent to take back the Appellant. The Appellant therefore prayed for dismissal of the Petition.

26. The case made by the Appellant in her Petition for restitution of conjugal rights and in her Petition for grant of maintenance is more or less similar. Her contention is that the Respondent failed and neglected to look after and maintain her and her daughter. The Respondent has filed written statements denying the contentions raised in the said Petitions.

27. The learned Judge of the Family Court accepted the ground of cruelty. He held that the Respondent husband has proved the said ground. He also observed that matrimonial bond between the parties is beyond repairs and, therefore, preservation of such marriage is totally unworkable and, therefore, the same has to be dissolved. The learned Judge observed that the wife belatedly filed the Petition for restitution of conjugal rights. The learned Judge observed that the Appellant - wife had proved that she is entitled to live separately without forfeiting her right to claim of maintenance. The learned Judge while dealing with the contention of the Respondent husband that the Appellant was employed in a Computer Institute held that the Appellant - wife was not

working after the year 2000. The learned Judge held that considering the income of the Respondent husband, the Appellant - wife is entitled to maintenance at the rate of Rs.6,000/- pm and the daughter is entitled to maintenance of Rs.3,500/- pm. The learned Judge, however, directed that the maintenance shall be payable from the date of the decree. The learned Judge did not record any reasons as to why the Appellant - wife and her daughter were dis-entitled to maintenance atleast from the date of filing of the Petition for grant of maintenance.

28. The learned counsel appearing for the Appellant - wife has taken us through the pleadings and the oral and documentary evidence on record. His submission is that apart from the fact that the Respondent husband has failed to establish the allegations of cruelty, taking the allegations as it is, at highest, the same constitute natural wear and tear of matrimonial life. He urged that even assuming that the said allegations are treated as proved, the same will not constitute cruelty. He has taken us through the notes of evidence and submitted that the learned Judge of the Family Court has ignored the very important admissions in the evidence of the Respondent and the contradictory stand taken by the Respondent and his witnesses. He pointed out the evidence of the Appellant - wife recorded in the Petition for grant of maintenance. He pointed out that the Appellant has come

out with true facts. He urged that though a contention was raised by the Respondent husband that the wife was gainfully employed, the said case has been disbelieved by the learned Judge of the Family Court. He invited our attention to the evidence of the Respondent husband in the said Petition. He pointed out that the husband admitted that he was working in Air India. However, in the evidence, he has not placed on record the correct figures of his income. In the cross-examination, he admitted that he was getting performance incentive. He also admitted that even in March, 1999 he had received performance linked incentive. He admitted that he has not submitted the details of his pay and incentives on the ground that he was not directed to do so. He urged that looking to the figures of the salary which are brought on record before the Family Court as well as this Court the Appellant - wife and her daughter are entitled to seek maintenance at the rate much more than what is granted by the Family Court and what is prayed for by the Appellant - wife. He urged that lot of expenditure is required to be incurred on the education of the daughter as she is grown up. He urged that there are no reasons to deny the maintenance at least from the date of filing of the Petition. He urged that evidence on record shows that the husband is having a flat at Thane which has been let out and the husband is earning substantial income. He also pointed out the material placed on record to show that the Respondent was residing

with another woman and they have a child. He would urge that considering this conduct, the Respondent was dis-entitled to a decree of divorce.

29. The learned counsel appearing for the Respondent husband pointed out that each and every incident of cruelty set out by the Respondent husband has been established on evidence. His submission is that the cumulative effect of each and every incident of cruelty will have to be taken into consideration which will establish cruelty meted out by the Appellant to the Respondent. He urged that evidence on record shows that unsubstantial allegations of scandalous nature have been made by the Appellant - wife against the Respondent husband which itself constitutes cruelty. He submitted that considering the conduct of the Appellant and her relatives, the Respondent was repeatedly forced to approach the police for filing complaints. He pointed out that notwithstanding the cruel behaviour of the Appellant - wife, the Respondent tried his level best to save the marriage in the interest of the daughter. He submitted that no interference is called for with the findings recorded by the learned Judge of the Family Court on the issue of cruelty.

30. The learned counsel relied upon the evidence of the Appellant - wife to show that she herself has deserted the Respondent

husband without any reasonable cause. He urged that the Appellant - wife is dis-entitled to maintenance. The learned counsel appearing for the Respondent husband relied upon the decisions of the Apex Court in the case of *Padmja Sharma vs. Ratan Lal Sharma*¹ and *Chand Dhawan (Smt) vs. Jawaharlal Dhawan*². He urged that no interference is called for with the impugned judgment and decrees. He stated that the Respondent has always come forward to pay for education expenses of the daughter.

31. We have given careful consideration to the submissions. We have perused the oral and documentary evidence on record. Firstly, it will be necessary to deal with the issue whether the ground of cruelty has been established. Apart from the allegations made in the divorce Petition about the conduct of the Appellant - wife based on various incidents, in paragraph 9 of the Petition for divorce the Respondent husband has stated thus :-

“The Respondent who since beginning was adamant and quarrelsome without appreciating the facts started doubting his character and created scene in house charging him having maintained relations with girls outside other than her and that for the aforesaid reasons he kept away from home. The Petitioner states that he was very much pained with the said allegations of Respondent and tried to make the Respondent understand the things and not to make such nonsense and baseless allegations which would lower his image

1 (2000) 4 SCC 266

2 (1993) 3 SCC 406

in his society but the Respondent refused to obey his suggestions.”

As far as this allegation is concerned, in paragraph 8 of the written statement, the Appellant - wife has dealt with the averments made in paragraph 9 of the Petition. Though there is no specific denial, there is a general denial incorporated in paragraph 8 of the written statement. In paragraph No.13 of the Petition, the Respondent husband has alleged thus :-

“The Petitioner states that the behaviour of Respondent was strange and unbecoming which created problems and mental torture resulting into adverse effect on his body and mind as a result he was not able to concentrate to his job. The Petitioner states that every night she fought with him and nearly every night and kept him awake till about 3-4 a.m. out of mental tension and anguish due to serious allegations of Respondent that he was womanizer.”

This allegation in paragraph 13 of the Petition is dealt with by the Appellant - wife in paragraph 12 of the written statement. We find that there is a general denial of the allegations made in paragraph 13 without denying the aforesaid specific allegations.

32. It will be necessary to make a reference to the cross-examination of the Respondent husband made by the Advocate for the wife. Paragraph 51 of the cross-examination reads thus :-

“51. It is true to say that, there is a case of bigamy against me in Khed Court. It is not true to say that, I have kept a mistress who have given birth to a child out of this relationship. It is not true to say that, I have filed a false case of cruelty against the respondent.”

(emphasis added)

33. The Respondent wife filed an affidavit in lieu of examination-in-chief. Though in the written statement there is no specific allegation made that the husband has kept a mistress, in paragraph 17 of her affidavit in lieu of examination-in-chief she has stated thus :-

“17. I say that I have filed a petition for restitution of conjugal rights in 1999. I came to know through reliable sources as both of us are same community, caste and distant relatives have informed us that the Petitioner has kept a mistress. Out of their illicit relation they have one daughter and showing that mistress as his own legally wedded wife he is taking all benefits entitled for the family from his employer. I say that the quarter is meant for the family and the Petitioner is staying in the quarter with his mistress along with his ill-legitimate daughter. I have produced on record the original birth certificate of his daughter born out of the illicit relation with the mistress kept by him named as “Roopali”. I hereby submit consent letter signed by the Petitioner when his Mistress delivered a baby child in Sai Ashutosh Hospital as “Ex.111” and Form no.2 of the Municipal Corporation of the City of Thane, Public Health Department as “Ex.111”. And original Birth Certificates produced on record of the daughter of the Petitioner under “Application of Respondent below Exhibit 86”.

(emphasis added)

34. In view of what is stated in the affidavit in lieu of examination-in-chief, we have carefully perused the record of the case. The Appellant - wife has referred to the documents at Exhibit 111. Exhibit 111 is a pursis containing the list of documents along with which two documents have been produced in the Divorce Petition. The first document is a photocopy of consent granted by the Respondent-husband to Sai Ashutosh Hospital at Thane for performing a surgery on one Roopali Pandurang Shinde. The second document is a photocopy of Form-2 under Rule 5 of the Maharashtra Registration of Birth and Death Rules, 1976. The said Form-2 shows that a female child was born in Sai Ashutosh Hospital at Thane and the Respondent husband is shown as the father of the child. The name of the mother is shown as one Mrs. Roopali. Both the documents have not been marked as Exhibits. Along with the application at Exhibit 86 in the Divorce Petition, the Appellant produced a certified copy of a birth certificate issued by the Thane Municipal Corporation showing that a daughter "Divya" was born on 2nd July, 2002 in Sai Ashutosh Hospital at Thane. The name of the father is shown as Shri Narendra Bhosale (the Respondent herein). The said application was filed on 19th November, 2002. On the said application, there is an endorsement under the signature of the Respondent husband showing that he has received the same on the very day. However, there is no reply filed by the Respondent to the said

application. In this context, it will be necessary to make a reference to the cross-examination of the wife made by the Respondent husband. Careful perusal of the cross-examination shows that on the contents of paragraph 17 of the affidavit in lieu of the examination-in-chief quoted above, there is no specific cross-examination made. In paragraph 20, it is brought on record that the Appellant - wife had filed proceedings against the Respondent alleging bigamy.

35. What is of very importance is the contents of application at Exhibit 86 made by the Appellant - wife in the Petition for divorce. In the said application seeking permission to produce a certified copy of birth certificate of "Divya", there is a specific statement made that the Respondent husband has got married with one Roopali and that from the wedlock, they have one issue named "Divya". Along with the said application, as stated above, a certified copy of the certificate of birth under Rule 9 of the Maharashtra Registration of Birth and Death Rules, 1976 has been produced. The said certificate has been issued under the signature of Ward Officer of Varkat Nagar, Thane Municipal Corporation under the seal of the Thane Municipal Corporation. On the same day, an application was made by the Appellant - wife at Exhibit 87. In the said application, it was contended that the Respondent husband has taken a flat being Flat No.207 (2nd floor), Building No.10,

Runwal Plaza Complex, Thane – 400 061. The specific allegation in the said application is that the Respondent husband was staying with the said Roopali in the said flat. There is an endorsement on the said application by the Respondent of having received a copy thereof on the very day. In the said application, it was prayed that witness summons may be issued to the Secretary of the Society in which the said flat was situated to remain present and produce a copy of the agreement in respect of the said flat. There is a reply filed to the said application dated 23rd December, 2002. The said reply is filed at Exhibit 88 under the signature of the Respondent husband. In the said reply, it is contended that his father sold his flat at Mulund and from the sale proceeds of the said flat at Mulund that the said flat at Runwal Plaza has been purchased. In the reply, the Respondent stated that the said flat is purchased in the joint names of himself and his mother. However, in the reply, the Respondent husband neither specifically nor generally denied the specific statements made in the application at Exhibit 87 that he was residing in the said flat with one Roopali.

36. As stated earlier, in the affidavit in lieu of evidence of the Appellant she specifically relied upon the certified copy of the birth certificate produced along with an application at Exhibit 86. We have already referred to the said certificate which shows that a daughter by

the name Divya was born on 2nd July, 2002 at Sai Ashutosh Hospital, Thane. The name of the father of the said girl is described as Shri Narendra Bhosale (Respondent). The name of the mother is shown as Mrs. Roopali. The address of the Parents was shown as a flat in Runwal Plaza.

37. In the deposition, the Appellant - wife also relied upon Exhibit 111 and the documents produced along with Exhibit 111. Exhibit 111 is a pursis filed by the Advocate for the Appellant - wife. Along with the pursis, a photocopy of consent form purportedly signed on 2nd July, 2002 by the Respondent is annexed. The said consent form is for giving treatment to one Mrs. Roopali Pandurang Shinde. Consent form signed by the said Roopali giving consent for surgery is also annexed. A photocopy of Form No.2 under Rule 5 of Maharashtra Registration of Birth and Death Rules, 1976 has been annexed by which one Shivaji Bhosale gave information that a child has been born on 2nd July, 2002 to the Narendra Bhosale residing at Room No.207, Ruwal Plaza, Thane. The name of the mother is mentioned as Mrs. Roopali.

38. Strict rules of evidence incorporated under the Indian Evidence Act, 1872 are not applicable to the Family Courts. The Appellant - wife specifically relied upon the certified copy of the birth certificate produced along with Exhibit 86 and photocopies of the

consent forms of Sai Ashutosh Hospital and Form No.2 which is the intimation of birth of a girl paragraph 17 of her affidavit. Moreover, as we have observed earlier, in the application at Exhibit 87, the Appellant - wife made a specific allegation that the Respondent was residing in the Flat No.207, Building No.10, Runwal Plaza, Thane along with the said Roopali. The said allegation that the Respondent was staying with the said Roopali is not denied in the reply filed by the Respondent at Exhibit 88. Certified copy of the birth certificate produced along with Exhibit 86 can be always read in evidence. The said certificate mentions that a girl Divya was born on 2nd July, 2002 at Sai Ashutosh Hospital, Thane. The names of the parents of Divya mentioned therein of the Respondent - husband and Mrs. Roopali and their address is shown as Runwal Plaza, Thane. In the reply to application at Exhibit 87, the Respondent admitted that he was having Flat No.207 in Building No.10, Runwal Plaza at Thane. In the documents produced along with Exhibit 111, the name of Sai Ashutosh Hospital appears which is the place of birth of the girl as shown in the certified copy of the birth certificate. The consent form is dated 2nd July, 2002 which is stated to be signed by the Respondent. The name of Roopali appears in the consent form. In the intimation of birth in Form No.2 the names of both the Respondent and Roopali appear and their address is shown as Flat No.207, Runwal Plaza, Thane. The place of birth is shown as Sai Ashutosh Hospital.

39. Surprisingly, there is no cross-examination of the wife made by the Advocate for the husband on the paragraph 17 of her affidavit in which she has relied upon the aforesaid documents and has stated that the said Roopali is the mistress kept by the Respondent.

40. The Respondent could have always given a suggestion to the Appellant - wife during her cross examination that the name of Narendra Bhosale appearing on the said documents is of someone else. Perhaps, giving such a suggestion was difficult as admittedly Flat No.207, Runwal Plaza, Thane is the address of the Respondent. The divorce petition was decided on 16th January, 2007 which was filed in the year 1996. The documents on record shows that the Respondent was keeping relationship with the said Roopali from the year 2001 and that the daughter Divya was born to them on 2nd July, 2002. Hence, it can be said that conduct of the Respondent maintaining a relationship with the said lady was established by the Appellant. It is established that the Respondent was staying with the said woman in the flat acquired in his name jointly with the mother.

41. Such conduct on the part of the Respondent dis-entitles him to a relief of a decree of divorce on the basis of the allegations of cruelty against the Appellant - wife. Under the Hindu Marriage Act,

1955 grant of a decree of divorce on the ground of cruelty is not as a matter of right. Section 23 makes this very clear. Moreover, such a conduct reflects on the veracity and truthfulness of the testimony of the Respondent - husband. Considering such conduct of the Respondent-husband, the impugned decree of divorce will have to be set aside.

42. Now, the issue which remains for consideration is regarding the quantum of maintenance.

43. As held by the learned Judge of the Family Court, the Appellant - wife was entitled to stay separately from the Respondent - husband. Moreover, now it is brought on record that the Respondent - husband was maintaining a relationship with the said Roopali. In fact, this relationship is taken into consideration while considering the issue of maintenance. It is true that the learned Judge has considered the claim for maintenance in the Petition invoking Section 18 read with Section 20 of the Hindu Adoption and Maintenance Act, 1956 (for short "the said Act of 1956") and Section 25 of the Hindu Marriage Act, 1955. Obviously, in the light of the law laid down in the case of *Chand Dhawan (Smt) vs. Jawaharlal Dhawan*, after setting aside the decree of divorce, the Appellant is not entitled to claim maintenance under Section 25. However, the Appellant and her daughter are entitled to claim maintenance under the said Act of 1956.

44. In paragraph 48 of the impugned judgment, the learned Judge of the Family Court has recorded a finding on the plea raised by the Respondent - husband that the Appellant was employed. The relevant finding reads thus :

“It is an admitted fact that in the proceedings even the oral evidence was recorded and prior to that a Commissioner was appointed as per the order dated 12-7-2005 i.e. subsequent to the application under Section 24. The Commissioners report is at Exh.17. The Commissioner paid visit to the Compunent Computer Education, Parag Vidyalaya at Bhandup on 10-08-2005 at 3.00 pm and made enquiry about the service of the respondent. The said enquiry reveals that the respondent Nilambari Bhosale was working in the institute prior to 4 to 5 years i.e. she was working in the institute upto 2000 and not thereafter. Thus, this report substantiate the case of the respondent that at present she is to earning and that negates the case made out by the husband that the respondent is earning. Under the circumstances therefore when the respondent won't have income, definitely she is entitled for alimony.”

This finding is not seriously challenged by the Appellant. In fact, he has not preferred any Appeal against the decree of maintenance.

45. The Appellant filed 'C' petition claiming maintenance on 3rd October, 2005. The learned Judge of the Family Court has not recorded any reasons as to why maintenance has been denied to the Appellant - wife and daughter from the date of filing of the Petition. In fact, the Appellant - wife claimed maintenance for herself and for her daughter

as well as monthly rent from 25th May, 1995. Her case is that from that day, she was forced to stay with her parents.

46. There was no reason brought on record to deny the maintenance from the date of filing of the 'C' Petition which is 13th September, 2005. However, she is not entitled to claim maintenance from the year 1995 as prayed by her as prior to filing of the 'C' Petition, she never claimed maintenance. Moreover, in the divorce Petition filed by the Respondent - husband in the year 1996, the Appellant applied for interim maintenance and was denied interim maintenance. But the daughter was granted maintenance. Now the finding is that the Appellant is not employed from the year 2000. Therefore, the maintenance to the Appellant and the daughter will have to be granted from the date of filing the "C" petition.

47. As the decree granting maintenance to the wife and daughter is not challenged by the Respondent - husband, now the question is what should be the quantum of maintenance payable to the Appellant and her daughter. A witness summons was issued at the instance of the Appellant - wife to the employer of the Respondent. The employer of the Respondent is Air India. The representative of Air India Shri Subramanian Balan produced the salary slip of the Respondent for

September, 2005. The said salary slip is at Exhibit-121. He produced the details of the payment made to the Respondent for the month of September, 2005 towards the performance linked incentive. The said statement is marked as Exhibit-122. The witness stated that every month the Respondent was paid performance linked incentive benefit. He stated that it fluctuates from month to month. He stated that if an employee works for the whole of the month, on an average, payment of performance linked incentive is approximately what is shown in Exhibit-122. He stated that the workmen of Air India are entitled to ex gratia payment per month and the Respondent was a workman. In the cross-examination, he admitted that though the policy of making payment of performance linked incentive was existing, the same may not exist tomorrow. In his deposition recorded on 8th March, 2006 he stated that last year an agreement took place between the Management and the Union and the pay scales were revised. He stated that the agreement was in force. He produced salary slip as well as details of performance linked incentive paid to the Respondent - husband in February, 2006. The said two documents are marked at Exhibits-127 and 128 respectively. Exhibit-121 which is the salary slip for September, 2005 shows that the gross amount paid to the Appellant Rs.26,211/- after making deduction of Rs.10601.06, the net salary payable is shown as Rs.15,609.94. However, out of the deduction amount, the dues of a Co-

operative Bank have been shown at Rs.4,835/-. This entire amount is not liable for deduction for the purposes of calculating the maintenance. Exhibit-122 shows that for September, 2005, he received incentive of Rs.14,920/- and after deducting income-tax and education cess, he received a sum of Rs.10,354/- towards incentive. Therefore, after taking into consideration all the deductions, net amount paid to the Respondent for September, 2005 comes to Rs.25,963.94. As stated earlier, this figure is calculated after considering the deduction of Rs.4,835/-. Suffice it to say that for determining the maintenance amount payable to the wife, the net income of the Respondent - husband in September, 2005 can be taken at Rs.25,000/- to 26,000/- pm.

48. The salary slip for February, 2006 at Exhibit-127 shows the gross salary of Rs.26,242/- and net salary of Rs.15,523.38/-. The deduction of Rs.10719.10 includes the dues of Co-operative Bank of Rs.4835/-. From Exhibit-128, it appears that performance linked incentive in January, 2006 was Rs.20,554.45/- and after deducting income-tax and education cess, the same comes to Rs.14,265.45/-. Thus, the net amount comes to Rs.29,788.83/-. If entire deduction of Rs.4,835/- is not considered, it can be safely stated that the net income of the Respondent in January/February, 2006 was not less than

Rs.30,000/- to 31,000/-. We must note here that the Respondent himself has not come out with a clear case regarding his net income. However, we must keep it in mind that the performance incentive may vary from time to time.

49. As stated earlier, the Petition for maintenance in “C” Petition No.119 of 2005 was filed on 13th September, 2005. The prayer made in the said Petition was for grant of maintenance of Rs.5,000/- each to the Appellant and her daughter and a sum of Rs.5,000/- pm by way of rent.

50. We must note here that no evidence has been adduced by the Appellant regarding the approximate amount which she is entitled to by way of rent for obtaining a reasonable accommodation. On this aspect she has adduced no evidence. Now that the decree for divorce is set aside, the Appellant will be entitled to seek appropriate relief by filing appropriate proceedings as regards the matrimonial home or grant of a reasonable amount towards residence.

51. As far as the quantum of maintenance is concerned, the learned Trial Judge has granted Rs.6,000/- pm to the Appellant and Rs.3,500/- to the daughter. The net income of the Respondent for

September 2005 was Rs.25,000/- to 26,000/- pm. From the evidence of Shri Subranium Balan, a representative of Air India and the documents at Exhibits-127 and 128 it can be seen that in January/February, 2006 the net income of the Respondent was more than Rs.30,000/- to 31,000/-.

52. Apart from the maintenance, the Respondent is liable to pay the amount required to meet the expenditure on education of the daughter. The present age of the daughter is about 21 years. She is pursuing higher education. Some amount has been paid by the Respondent towards the education expenses of the daughter during the pendency of the Appeal. The Respondent will have to pay a reasonable amount towards expenditure on the education of the daughter as and when called upon to do so. If the Respondent fails to pay the amount, it will be open for the Appellant to file appropriate proceedings before the appropriate Court.

53. Our conclusion is that the Appellant and her daughter were entitled to maintenance at the rate of Rs.5,000/- each from the date of filing of the Petition for maintenance. This amount will be inclusive of the interim maintenance paid by the Respondent-husband during the proceedings before the Family Court and the amounts paid by him

towards maintenance on the basis of the interim orders of this Court. A reasonable time can be granted to the Respondent to pay arrears. The amount which we have determined is on the basis of the income of the Respondent brought on record during the trial. On the basis of the subsequent increase in the salary and allowances, the Appellant will be entitled to file appropriate proceedings before the appropriate Court for enhancement of maintenance.

54. Considering the finding which we have recorded that the Respondent is staying with another woman, a decree for restitution of conjugal rights cannot be passed.

55. As far as cost of the Appeals is concerned, the same is quantified at Rs.15,000/-.

56. We must make it clear that the Respondent will not be entitled to refund of any amount paid by him during the pendency of the proceedings including this Appeal to the Appellant towards the cost of education of the daughter. Hence, we pass the following order :-

ORDER

- (i) Family Court Appeal No.40 of 2007 is allowed and the impugned decree of divorce passed in Petition No.A-860 of 1996 is quashed and set aside. Petition No.A-860 of 1996 accordingly stand dismissed;

- (ii) Family Court Appeal No.25 of 2007 is hereby dismissed and decree passed in Petition No.A-295 of 1999 is hereby confirmed;
- (iii) Family Court Appeal No.133 of 2007 is partly allowed. The impugned decree in Petition No.C-119 of 2005 is modified. We direct the Respondent - husband to pay to the Appellant - wife and daughter total maintenance amount of Rs.10,000/- pm from September, 2005 onwards;
- (iv) In addition, we direct the Respondent to pay an amount equivalent to the expenditure incurred by the Appellant wife on the education of daughter as and when called upon to do so by a communication addressed by the Appellant along with true copies of the supporting documents. On the failure of the Respondent - husband to pay or on Respondent - husband disputing the quantum of the amount payable, it will be open for the Appellant to file appropriate proceeding before the appropriate Court for seeking appropriate relief;
- (v) As observed earlier, it will be open for the Appellant to file appropriate proceedings before the Family Court for enhancement of maintenance on the basis of

subsequent increase of income of the Respondent after January, 2007. It will be also open for the Appellant to file appropriate proceedings seeking appropriate relief as regard accommodation and/ or payment of rent ;

- (vi) There will be no order as to costs in FCA No.25 of 2007. The Respondent shall pay total cost of Rs.15,000/- in FCA No.133 of 2007 and 40 of 2007. The amount of costs shall be paid to the Appellant within a period of two months from today;
- (vii) The arrears of maintenance payable in terms of the modified decree shall be paid by the Respondent to the Appellant on or before 30th June, 2015;
- (viii) All payments shall be made by the Respondent to the Appellant by directly transferring the amounts to the Appellant's Bank Account. All details of the Appellant's Bank Account shall be furnished by the Advocate for the Appellant to the Advocate for the Respondent within a period of two weeks from today. It is obvious that the Respondent will be entitled to adjust the amount of maintenance (exclusive of education expenses) paid by him to the Appellant during the pendency of the Appeal or during the pendency of the proceedings before the

Family Court.

- (ix) Pending Civil Applications do not survive and the same are disposed of.

(A.S. GADKARI, J)

(A.S. OKA, J)